

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO SIMMONS,

Defendant-Appellant.

UNPUBLISHED

October 13, 2011

No. 299399

Wayne Circuit Court

LC No. 08-017172-FC

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction, and 13 to 21 years' imprisonment for the second-degree murder and assault with intent to commit murder convictions. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the shooting death of the victim, Maurice Nimmons. The victim was parked in his vehicle with his girlfriend and front seat passenger, Sharniece Taylor. Sharniece's sister, Zaneta Taylor, was in the backseat with Maurice Carr, Tiffany White, and Laquindra Townsend. Defendant called out to Sharniece when the victim was about to drive away from an apartment building. The victim and defendant exchanged words and then stared at each other. Defendant pulled a handgun and began shooting into the vehicle. Sharniece saw blood on the victim. She pulled him down to take cover, and the backseat passengers fled the vehicle. Sharniece climbed over the victim and drove to the hospital where the victim died. Carr was running from the scene when he was struck in the leg by a bullet. Bullet holes were found on the inside and exterior of the vehicle. Although charged with first-degree murder, defendant was convicted of second-degree murder and three counts of assault with intent to commit murder involving Carr, Sharniece, and Zaneta.

Defendant first alleges that he was deprived of his "right to have his jury decide his fate" when the trial court dismissed a tardy juror. We disagree. The trial court's decision to dismiss a juror is reviewed for an abuse of discretion. *People v Clyburn*, 55 Mich App 454, 456; 222 NW2d 775 (1974). The trial court may not arbitrarily remove a juror; rather, the trial court must make factual findings and state those findings on the record. *People v Anglin*, 6 Mich App 666,

675; 150 NW2d 532 (1967). The trial court occupies a better position to investigate and assess the juror's qualifications. *Clyburn*, 55 Mich App at 456. "An appellate court will hesitate to interfere with the trial court's exercise of its discretion in dismissing a juror when the reason for doing so is discovered after the jury is impaneled." *Id.*

In the present case, the juror delayed the second day of trial when he arrived at court an hour late. The trial judge stated that he delayed the trial to wait for the juror at the request of defense counsel. That day, the trial court stressed to the jurors that they needed to timely appear for court. The next day, the same juror did not timely appear. The trial judge stated on the record that ten telephone calls were made, but the court's staff was unable to make contact with the juror. Defense counsel objected to the dismissal of the juror. When the trial court requested a reason for the objection, other than the general compulsion to object, defense counsel did not offer a legal basis, but rather stated that the juror may be stuck in traffic. The trial court found that reason was highly unlikely when everyone else had timely appeared. There is no indication in the lower court record that the tardy juror ever appeared for court that day.

Based on the record available and the trial court's factual findings, the trial court did not abuse its discretion by dismissing the tardy juror. *Clyburn*, 55 Mich App at 456; *Anglin*, 6 Mich App at 675. The juror was late for the second day of trial and discussed the issue with the trial judge. Despite the judge's request that the jurors timely appear, this same juror did not timely appear for the next and final day of trial. After waiting for forty minutes and attempting multiple telephone contacts, the trial court decided to proceed without the juror. At the time of the trial court's decision, the proofs had been presented, and the parties were waiting to commence closing arguments. Defendant's contention that he was deprived of his right to a jury trial is simply without merit. The jury panel was composed of fourteen members, and thirteen jurors remained after the dismissal of the tardy juror. Ultimately, defendant's convictions were deliberated by twelve jurors. Accordingly, this claim of error is without merit.

Next, defendant alleges that there was insufficient evidence to support the assault with intent to commit murder conviction with regard to Zaneta Taylor. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010). The elements of the crime may be proven by circumstantial evidence and reasonable inferences arising from the evidence. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. *Id.* When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

To establish the crime of assault with intent to commit murder, the prosecutor must prove that an assault occurred with the actual intent to kill, which if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Pursuant to the doctrine of transferred intent, the general intent to kill need not be directed at an identified individual or the eventual victim. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003).

In the present case, defendant contends that there was insufficient evidence to support the assault with intent to commit murder conviction of Zaneta because she was “gone from that area, never having been in the line of fire and never assaulted, directly or through transferred intent.” However a review of the record reveals that Zaneta testified that she was in the back of the vehicle behind the driver’s seat. She further testified that she was in the vehicle when at least two shots were fired into it and that she feared being shot. Defendant’s contention is not supported by the evidence admitted at trial. *Phelps*, 288 Mich App at 217. Therefore, this issue does not entitle defendant to appellate relief.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter